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## Challenges in the Judicial Administration of Muslim Estates in the Sharia Courts of Appeal in Nigeria

*by Abdulmumini Oba and Ismael Saka Ismael*



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# Challenges in the Judicial Administration of Muslim Estates in the Sharia Courts of Appeal in Nigeria

by Abdulmumini A. Oba\* and Ismael Saka Ismael\*\*

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## Abstract

The Nigerian legal system is pluralistic with common law, Islamic law and customary law as the major legal traditions/cultures in the country. However, the judicial structures for administration of Islamic law and customary law are largely ad hoc and haphazard. The Sharia Courts of Appeal are pivotal in the administration of Islamic personal law which includes matters relating to inheritance (*mirāth*) and wills (*wasiyyah*). Although these courts are superior courts of record created by the Constitution, they do not have a clearly spelt-out legal framework for the administration of estates. This poses legal challenges that include unresolved questions concerning the status of the estate distribution panels constituted by the Sharia Courts of Appeal, ambivalence in the membership of the panels, and limitations of the panels in dealing with substantive legal issues. Other challenges include jurisdictional competition from the area/sharia courts and the legal implications of litigation on an estate distributed by the panel coming on appeal before the same Kadis. The paper recommends that the Grand Kadis of the Sharia Courts of Appeal invoke their statutory and constitutional powers to make the appropriate court rules for the administration of estates in their courts.

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## I. Introduction

In Nigeria, the regulation of marriages governed by Islamic law is within the legislative competence of the states while the federal government regulates marriages governed by statutory law.<sup>1</sup> However, the administration of estates under all these marriage regimes comes under residual matters which are within the exclusive jurisdiction of the states.<sup>2</sup> The Nigerian legal system is pluralistic with common law, Islamic law and customary law as the major legal traditions/cultures in the country.<sup>3</sup> Islamic law and customary law were the dominant state law in the pre-colonial era in their respective areas of influence; colonialism relegated both to the background. The colonial authorities adopted common law as state law which operated in the country as a full-fledged legal system but curtailed the operation of Islamic law and customary law.<sup>4</sup> Islamic law became a mere variant of customary law and there was no systematic attempt to incorporate Islamic law and customary law into the country's legal system.<sup>5</sup> Rather, ad hoc and haphazard laws were made for the administration of both laws. The position has remained largely the same in the post-colonial era (despite attempts to systemize the administration of Islamic law by some states in northern Nigeria in the post-1999 era).<sup>6</sup> This haphazardness is reflected in the legal framework for the administration of estates in the Sharia Court of Appeal which was first established in the Northern Region of Nigeria in 1960 as an Islamic court of equal status with the High Court.<sup>7</sup> The Sharia Courts of Appeal are pivotal in the administration of Islamic personal law which includes matters relating to inheritance and wills. However, a major challenge is that although the Sharia Courts of Appeal are superior courts of record created by the constitution,<sup>8</sup> there are no clear rules for administration of estates in these courts. Another challenge is that the Constitution makes the court optional for states.<sup>9</sup> While there are Sharia Courts of Appeal in all the states in northern Nigeria, none has been established in any of the states in the southern part of the country. In addition, the Sharia Courts of Appeal being essentially appellate courts need trial or subordinate courts from whence appeals would come. There are area courts and sharia courts for this purpose in all northern states,<sup>10</sup> but there are no such courts in the southern states.

This paper examines the legal framework under classical Islamic law and in the Sharia Courts of Appeal for the administration of estates. The paper identifies the *lacunae* and ambiguities in the legal framework for administration of estates in the Sharia Courts of Appeal and explores

<sup>1</sup> The Constitution puts "The formation, annulment and dissolution of marriages other than marriages under Islamic law and Customary law including matrimonial causes relating thereto" on the Exclusive Legislative List, see Item 61, Second Schedule, Part I, Exclusive Legislative List, Constitution of the Federal Republic of Nigeria, as amended 1999 (the 1999 Constitution).

<sup>2</sup> See ONOKAH MARGARET, *Family Law*, Ibadan 2007, at 7-12.

<sup>3</sup> See OBA ABDULMUMINI ADEBAYO, *Harmonisation of Shari'ah, Common Law and Customary Law in Nigeria: Problems and Prospects*, *Journal of Malaysian and Comparative Law*, Vol. 35 (2008), at 119-145.

<sup>4</sup> *Id.*, at 120-126 and OBA ABDULMUMINI ADEBAYO, *The Administration of Customary Law in the Post-Colonial Nigerian State*, *Cambrian Law Review*, Vol. 37 (2006), at 95-112.

<sup>5</sup> See generally OBA ABDULMUMINI ADEBAYO, *Sharia Court of Appeal in Northern Nigeria: The Continuing Crises of Jurisdiction*, *American Journal of Comparative Law*, Vol. 52(2004), No. 4, at 859 and OBA, *supra* n. 3, at 123.

<sup>6</sup> See a summary of the ambit of the post 1999 reforms in OBA, *supra* n. 3, at 132.

<sup>7</sup> See *Sharia Court of Appeal Law* (no. 16 and 30 of 1960), Cap. 122, *Laws of Northern Nigeria*, 1963; on the circumstances surrounding the establishment of the court, see OBA, *supra* n. 5, at 859-867.

<sup>8</sup> Section 6 (3) and (5) (a)-(i), 1999 Constitution

<sup>9</sup> "There shall be for any State that requires it a Sharia Court of Appeal for that State": Section 275 (1), 1999 Constitution.

<sup>10</sup> For example, see Section 54 (1), *Area Courts Law*, Cap. A9, *Laws of Kwara State*, 2004 and Section 51, *Sharia Courts Law*, State, 2001 respectively.

the legal challenges which the absence of a clearly spelt-out legal framework poses to the courts and Muslims in matters of inheritance (*mirāth*) and bequests (*wasiyyah*) and suggests what can be done to remedy the situation.

The paper uses the Kwara State Sharia Court of Appeal as a case study since the court has consistently engaged in estate distribution and it has published comprehensive reports of its activities in this regard since 1994. Since there is no Sharia Court of Appeal in any of the southern states, this paper is limited to considering the position in the northern states. In terms of sources, this paper relies on statutes, judicial decisions and court records (again, particularly those of the Kwara State Sharia Court of Appeal),<sup>11</sup> interviews of relevant role actors such as judges, lawyers and litigants<sup>12</sup> and the experience and observations of the authors as practicing lawyers in Nigeria.<sup>13</sup>

## II. The Legal Framework for the Administration of Estates in the Sharia Courts of Appeal

The Constitution gives the Sharia Court of Appeal of each state a limited jurisdiction consisting of an appellate and a supervisory jurisdiction in civil proceedings involving “any question of Islamic personal law regarding a *wakf*, gift, will or succession where the endower, donor, testator or deceased person is a Muslim”.<sup>14</sup> This jurisdiction is in addition to “such other jurisdiction as may be conferred upon [the court] by the law of the [applicable] state”.<sup>15</sup> The Supreme Court has held that any additional jurisdiction conferred on the Sharia Court of Appeal by any such law must be within the ambit of Islamic personal law.<sup>16</sup> What follows from this is that there is nothing preventing states from giving original jurisdiction to their own Sharia Courts of Appeal provided that it is limited to Islamic personal law. However, no state has taken advantage of this to give original jurisdiction to its Sharia Court of Appeal. On the contrary, the constitutive law of the Sharia Courts of Appeal in some states expressly prohibits the court from having original jurisdiction in any matter.<sup>17</sup>

The Constitution makes provisions for the adjective and procedural laws applicable in the Sharia Courts of Appeal. The Constitution says that subject to the provisions of any law made by the House of Assembly of the relevant states, the Grand Kadis may make rules “regulating the practice and procedure” in the Sharia Courts of Appeal.<sup>18</sup> The constitutive law of the Sharia Courts of Appeal of the various states makes “Islamic law of the Maliki school” and “natural

<sup>11</sup> There is a paucity of reported cases of Islamic courts. Although all the 19 states in northern Nigeria have a Sharia Court of Appeal each, only the Kwara State Sharia Court of Appeal publishes an annual report of the activities of the Court. As of now, the reports for 1994 to 2015 are available.

<sup>12</sup> These interviews are largely informal and unstructured.

<sup>13</sup> Both authors are conversant with the practice of law in Nigeria generally and in Kwara State in particular where they have practiced as legal practitioners for more than three decades and two and half decades respectively.

<sup>14</sup> Section 277 (1) and (2), 1999 Constitution.

<sup>15</sup> Section 277 (1) and (2), 1999 Constitution.

<sup>16</sup> *Fannami v Sarki* (1961-1989) 1 Sh. L. R. N. 94, *Maida v Modu* (2000) 4 NWLR (Pt. 659) 99, *Faransi v Noma* (2007) 10 NWLR (Pt. 1041) 202 and *Fada v Ibrahim* (2015) LPELP 24449. See also OBA, *supra* n. 5, at 858-874.

<sup>17</sup> For example, in Kwara State, see Section 10 (3), Sharia Court of Appeal Law, Cap. S4, Laws of Kwara State, 2007: “Except as provided in subsection (2), the Court shall have no original jurisdiction in any cause or matter”. Subsection (2) deals with matters incidental to the powers of the court as an appellate court.

<sup>18</sup> See Sections 274 (High Courts) and 279 (Sharia Courts of Appeal), 1999 Constitution.

justice, equity and good conscience according to Islamic law” as a part of the sources of the courts’ procedural laws.<sup>19</sup>

In classical Islamic law, courts are constituted by Kadis. Although the Kadi is primarily a judge, the role of the Grand Kadis under Islamic law is not limited to litigation. In relation to administration of estates, where a Kadi is vested with a general unrestricted jurisdiction, scholars say that this jurisdiction includes guardianship over persons who are incapable of looking after their affairs such as minors and insane persons, administration of endowments (*waqf*), and disposing of legacies under wills (*wasiyyah*).<sup>20</sup> These jurisdictions are exclusive as no other official shares these jurisdictions with the Kadi.<sup>21</sup> However, Kadis do not have exclusive jurisdiction in the distribution of inheritance.<sup>22</sup> The primary jurisdiction to distribute estates of a deceased person among the heirs is vested on competent Muslims who possess the requisite knowledge.<sup>23</sup> The scholars and leaders of the Sokoto Caliphate accepted the traditional Islamic exposition of the administration of estates. However, when there are not many who possess the knowledge of distribution of estates, the Kadi could assume jurisdiction upon invitation of the heirs. Such was the position in the early period of the Sokoto Caliphate and thus one of the leaders, Abdullahi bin Fodiye, puts distribution of estates among heirs as one of the jurisdictions of the Kadi.<sup>24</sup> What follows from this is that although Kadis do not have exclusive jurisdiction in the distribution of estates among heirs, disputes as to inheritance being matters affecting the “rights of persons” are within the jurisdiction of the courts.<sup>25</sup>

In addition to recourse to Islamic law of the Maliki school, the constitutive laws of the Sharia Courts of Appeal in each state specifically allow Grand Kadis to make rules concerning the administration of estates in their respective courts. For example, section 24 of the Sharia Court of Appeal of Kwara State provides *inter-alia* thus:

“The Grand Khadi<sup>26</sup> with the approval of the Governor may make rules of court providing for any or all of the following matters –

[...]

(h) securing the due administration of estates;

(i) requiring and regulating the filing of accounts of administration of estates;

(j) ascertaining the value of estates;

[...]

(o) generally carrying into effect the provisions of the Law.”<sup>27</sup>

<sup>19</sup> For example in Kwara State, see Section 13 (a), Sharia Court of Appeal Law, Cap. S4, Laws of Kwara State, 2007.

<sup>20</sup> See AL-MAWARDI ABU AL-HASAN, *The Ordinances of Government: A Translation of al-Ahkām al-Sultāniyya wa al-Wilāyah al-Dīniyya* (translated by Wafaa H. Wahba), Reading 1996, at 79.

<sup>21</sup> FODUYE ABDULLAHI BIN, *Guide to Administrators Diyā’ al-Hukkaīm* (edited and translated by Shehu Yamasa), Sokoto 2000, at 21. The surname is also spelt as ‘FUDI’ and ‘FODIO’.

<sup>22</sup> This jurisdiction is not included among the jurisdiction of Islamic courts in AL-MAWARDI, *supra* n. 20, at 79-80 and AL-JAZA’IRY ABU BAKR JABIR, *Minhaj al-Muslim*, Riyadh, Vol. 2 (2001), at 537-538.

<sup>23</sup> See Qur’an 4: 7-9.

<sup>24</sup> FODUYE, *supra* n. 21, at 21.

<sup>25</sup> See AL-MAWARDI, *supra* n. 20, at 79, and AL-JAZA’IRY, *supra* n. 22, at 537.

<sup>26</sup> This spelling has no legal backing as the spelling that the constitution has adopted is ‘Kadi’, see Sections 275-279, 1999 Constitution.

<sup>27</sup> Section 24 (h)-(j), (o), Sharia Court of Appeal Law, Cap. S4, Laws of Kwara State, 2007.

These rules clearly intend that the administration of estates of Muslims should be within the jurisdiction of the Sharia Court of Appeal and that the control of rules relating thereto should be in the hands of the Grand Kadi.

### III. The *Lacunae* in the Legal Framework for the Administration of Estates

Although Grand Kadis have statutory powers to make rules of court relating to the administration of estates in the Sharia Courts of Appeal, no Grand Kadi has exercised this power, even though this power had been granted to them since the creation of the Sharia Court of Appeal in the defunct northern region of Nigeria.<sup>28</sup> The courts that succeed did not invoke their jurisdiction in respect of administration of estates until recently. Although in 2007 the then Grand Kadi in Kwara State referred to “the approval of [the Governor] to formalize the distribution of the estates of Muslims”,<sup>29</sup> this reference was to the fact that the Court had obtained the approval of the Governor for the court to charge fees for the distribution of estates through a memo.<sup>30</sup> While the power to charge fees implies the power to distribute estates, there are still no rules stating the procedure that the court and applicants would follow in the distribution of estates. In any case, the approval and the fees approved were not published in the official gazette as required in cases of delegated legislation.<sup>31</sup> The authors have not come across any rules for the administration of estates in the Sharia Courts of Appeal in any of the northern states. For the foregoing reasons, the procedures for the administration of estates in the Sharia Courts of Appeal are currently not based on clear-cut rules.<sup>32</sup>

Some disagree and affirm that based on the current laws, the Sharia Courts of Appeal have an inherent *jurisdiction* and *power* to distribute estates. For example, ISHOLA argues that sections 10 and 11 (which confer appeal jurisdiction on the Sharia Courts of Appeal) and 24 of the Sharia Court of Appeal law (which empowers the Grand Kadi to make rules for the administration of estates) together with “a clear and proper grasp of the scope and nature of the inherent jurisdiction of the court”<sup>33</sup> conferred on the court by the Constitution make it “logical to conclude that extra judicial services of the court are within and intrinsic to the exercise of the judicial jurisdiction of the court and therefore not statutorily baseless, but is rather constitutionally justified”.<sup>34</sup> The reliance placed on sections 10, 11 and 24 of the Sharia Court of Appeal Law is misplaced. Sections 10 and 11 merely affirmed the *appellate* jurisdiction of the court in matters of Islamic personal law and therefore cannot be stretched beyond this. The jurisdiction to distribute estates can be inferred from section 24. It is arguable that under section 24 the Grand Kadi of a state has power to make rules for the administration of estates

<sup>28</sup> Section 25 (h), Sharia Court of Appeal Law, Cap. 122, Laws of Northern Nigeria, 1960.

<sup>29</sup> 2007 Annual Report of the Sharia Court of Appeal, Kwara State, at X.

<sup>30</sup> See the Kwara State Sharia Court of Appeal approved memo SCA/GKC/C/77/04 of 19 October 2005 cited in AMBALI MUTTALIB ATANDA, *The Practice of Muslim Family Law in Nigeria*, 3<sup>rd</sup> ed., Lagos 2013, at 382.

<sup>31</sup> Section 20 (3) Interpretation Act, Cap. I5, Laws of Kwara State, 2007, provides that “All orders, regulations and rules of court made under any law of the State shall be published in the State Gazette”.

<sup>32</sup> See OBA ABDULMUMINI ADEBAYO, *The Sharia Court of Appeal: Accounting to the Public in Kwara State*, *The Jurist*, Vol. 10 (2005), 161 at 165.

<sup>33</sup> ISHOLA ABDULLAHI SALIU, *Beyond Adjudication: The Extra Judicial Services of the Sharia Court Appeal to the Muslim Community in Nigeria*, *Al-Irshaad (The Guidance)* - Maiden Edition of the Magazine of the Muslim Students Society of Nigeria (MSSN), Kwara State University Branch, Vol. 1(1) (2013), 46 at 47.

<sup>34</sup> *Id.*



and that the Sharia Court of Appeal could distribute estates if the Grand Kadi has made the relevant rules. In absence of such rules, there is no legal basis for the distribution of estates by the Sharia Courts of Appeal. What this means is that although the court has *jurisdiction* to administer estates, it has not yet acquired the *power* to do so. Although ISHOLA did not proffer arguments in support of his reliance on section 24, the section could provide a basis for the *power* of the Sharia Courts of Appeal to administer estates if properly utilized. Again, the inherent jurisdiction argument cannot provide a basis for this *power*. It is true that the Constitution recognizes and affirms the inherent power of all superior courts of record in the country. Section 6 (a) of the 1999 Constitution provides that:

“The *judicial powers* vested in accordance with the foregoing provisions of this section -

(a) shall extend, notwithstanding anything to the contrary in this constitution, to *all inherent powers and sanctions of a court of law*” (emphasis supplied).

The court referred includes the Sharia Courts of Appeal.<sup>35</sup> Two questions come up here. First, it is clear that the section refers to “judicial powers” of “a court of law”. Is the Sharia Court of Appeal a court exercising judicial powers while distributing estates? This question has been asked many times in the course of administration of estates by the Sharia Courts of Appeal over the years. As noted below, the Kadis (at least in Kwara State) do not claim to exercise judicial powers of a court. The second question is what are the inherent powers of a court and especially, what are specifically the inherent powers of the Sharia Courts of Appeal? As noted by OBA:

“Inherent powers are generally vague and are part of “an innate and intrinsic element in the court’s search for justice”. It is likely that these powers and sanctions are different in the common law and Islamic law traditions. If this is the case, then, for the Sharia Court of Appeal, these powers and sanctions must be traced not to the common law courts as in the case of courts of common law origin such as the High Court, but to Islamic courts in their pristine form. The implication is therefore that this section preserves for the Sharia Court of Appeal, all the inherent powers and sanctions that Islamic courts traditionally possessed” (references omitted).<sup>36</sup>

The inherent powers and sanctions of Islamic courts are discussed above. Islamic courts traditionally have the *jurisdiction* and *power* to administrate estates. However, according to OBA there is a further caveat to this within the Nigerian legal system:

“The relationship between these inherent powers and sanctions and the Constitution needs comment. A literary reading of the provisions of section 6 (6) (a) wording of the section creates the impression that the Constitution has placed these powers and sanctions over and above the provisions of the Constitution. However, judicial interpretations have pointed to the contrary. The courts have held those inherent powers though omnibus does not extend the jurisdiction of a

<sup>35</sup> See Section 6 (5), 1999 Constitution.

<sup>36</sup> OBA, *supra* n. 5, at 881-882.

court of record and that the powers must be exercised subject to the Constitution and other statutes”(references omitted).<sup>37</sup>

Another argument that can be advanced in support of the power of the Sharia Courts of Appeal to distribute estates is that the court could invoke Maliki law as provided in the Sharia Court of Appeal laws to fill the *lacuna* in the distribution of estates rules. For example, in Kwara State the relevant law states that:

“As regards both *substantive law* and *practice and procedure*, [the court] shall administer, observe and enforce the observance of the principles and provisions of (a) Islamic law of the Maliki school [...] and (d) natural justice, equity and good conscience according to Islamic law”.<sup>38</sup>

However, we found no specific reference to Maliki rules by the Sharia Courts of Appeal generally and the Kwara State Sharia Court of Appeal in particular in matters of distribution of estates. The statute quoted above notwithstanding, it is reasonable to postulate that with the existence of rules of court in the Sharia Courts of Appeal – even though the rules do not cover the administration of estates – Islamic law of the Maliki school as a source of procedural rules is only complementary rather than primary and as such could not be the major source of rules relating to administration of estates in the court. It would also appear equally reasonable to assert that given the tenor of the same statutory provision, the court can invoke Islamic law in absence of any rules expressly promulgated by the Grand Kadi.

It should be pointed out that the controversy on the rules for the distribution of estates in the Sharia Courts of Appeal is a needless one. The Grand Kadi can put an end to the controversy by making the relevant rules and getting the Governor of the relevant state to approve the rules.

## IV. Consequences of Absence of a Well-Defined Legal Framework for the Distribution of Estates

The problems inherent in the absence of a well-defined legal framework were evident in the work of the Sharia Courts of Appeal panels involved in the distribution of estates.

### 1. Status of estate distributing panels

There are some ambiguities in the status of estate distribution panels of the Sharia Court of Appeal. First, it is not clear in which capacity the court is distributing estates. In Kwara State Kadis wear their official robes when meeting for distributing estates and do not use the regular court but use a disused courtroom that has now been refurnished and rearranged to make it more conducive to the more informal task of estate distribution. The sitting arrangement is unlike the formal court where lawyers sit fully robed opposite the Kadis and the parties sit by the side. While distributing estates, lawyers are not robed and they sit by the heirs facing the panel. The Kadis themselves are not sure of their status when distributing estates. Grand Kadis

<sup>37</sup> OBA, *supra* n. 5, at 882.

<sup>38</sup> Section 13 (a) and (d), Sharia Court of Appeal Law, Cap. S4, Laws of Kwara State, 2007 (italics supplied).

have variously described estate distribution as the court's "semi-constitutional judicial duties",<sup>39</sup> "extra-judicial activities"<sup>40</sup> "community services",<sup>41</sup> and "semi-judicial function".<sup>42</sup> Official records usually refer to Kadis distributing estates as "officiating ministers"<sup>43</sup> but in addition to this term the 2002 report of the court variously referred Kadi in charge of distributing the estate as "distributing officer", "administrator" and "secretary/administrator".<sup>44</sup> The appellation "officiating minister" has also been used for non-Kadis to distribute estates.<sup>45</sup> No one considers the panel of Kadis distributing an estate as sitting as a court. It is probably because of the ambiguity in status that the panels would not assume jurisdiction to distribute estates unless the invitation to the court is supported by the unanimity of the heirs. Thus, in the *Estate of Justice Olagunju* the deceased was a justice of the Court of Appeal. The President of the Court of Appeal asked the Kwara State Sharia Court to administer the estate. However, the Kwara State Sharia Court of Appeal did not continue with the distribution of the estate as the non-muslim wife and daughter of the deceased by obtaining letters of administration in respect of the estate protested against the Sharia Court of Appeal distributing the estate.<sup>46</sup>

## 2. Powers of estate distributing panels

There is the question of the legal status of orders that a Sharia Court of Appeal estate distribution panel makes. Since a Sharia Court of Appeal estate distribution panel does not have the powers of a court, any order that the panel makes is not a court order. The uncertain nature of the panel's status and powers creates problems when the panel has to deal with those who are not parties to the distribution before court. This problem comes up for example where the court wants to access the deceased's bank accounts. Banks normally require letters of administration. In Kwara State when the heirs have yet not obtained letters of administration, the Sharia Court of Appeal has resorted to issuing letters of request for banks to pay such moneys into the account of the Court. This request presents a legal challenge to banks. Most banks located in Kwara State will comply with the request often after personal interactions with the court registrar. It is not so simple with branches of banks located outside the states. Some banks (mostly bank branches located in the south) ask rightly in our view that the Chief

<sup>39</sup> See 2001 Annual Report of the Sharia Court of Appeal, Kwara State, at V (per Ambali, Grand Kadi).

<sup>40</sup> 2012 Annual Report of the Sharia Court of Appeal, Kwara State, at VII (per Haroon, Grand Kadi), 2010 Annual Report of the Sharia Court of Appeal, Kwara State, at V, and 2011 Annual Report of the Sharia Court of Appeal, Kwara State, at VII.

<sup>41</sup> 2014 Annual Report of the Sharia Court of Appeal, Kwara State, at VII (per Muhamad, Grand Kadi) and 2015 Annual Report of the Sharia Court of Appeal, Kwara State, at VI.

<sup>42</sup> 2013 Annual Report of the Sharia Court of Appeal, Kwara State, at VII (per Haroon, Grand Kadi) and 2013 Annual Report of the Sharia Court of Appeal, Kwara State, at VI.

<sup>43</sup> For example, see 2014 Annual Report of the Sharia Court of Appeal, Kwara State, at 439.

<sup>44</sup> See 2002 Annual Report of the Sharia Court of Appeal, Kwara State, at 201, 205 and 208 respectively.

<sup>45</sup> For example, in the *Estate of Akano*, 2014 Annual Report of the Sharia Court of Appeal, Kwara State, 379 at 381. The person listed as no. 2 on the attendance list as "officiating minister" is an Islamic scholar, but not a Kadi. Again, in the *Estate of Sami*, 2013 Annual Report of the Sharia Court of Appeal, Kwara State, at 214, the Islamic scholar described as "officiating minister" and listed as no. 2 on the attendance list at 216, 225, 228, 235, and no. 3 on the attendance list at 237, is not a Kadi.

<sup>46</sup> The annual report of the Court does not contain a report of this estate. However, newspapers reports are available, see "Request for withdrawal of Sharia Court of Appeal from administration of the Estate of Late Hon. Justice S.A. Olagunju", *The Nation*, 24 November 2013, available at: <http://thenationonlineng.net/re-request-withdrawal-sharia-court-appeal-administration-estate-late-hon-justice-s-olagunju/>, OLADIMEJI SAMUEL, "Release My Husband's Estate, Justice's Widow Urges Court", *Frontiers News*, 18 October 2013, available at: <http://www.frontiersnews.com/release-my-husbands-estate-justices-widow-urges-court/> and "Release my husband's property, late justice's widow urges court", *The Nation*, 20 October 2013, available at: <http://thenationonlineng.net/release-husbands-property-late-justices-widow-urges-court/> (all links last assessed on 17 July 2016).

Registrar should furnish them with a certified copy of the court order directing the bank to release the moneys to the Court. In reality, no such order exists because the Sharia Court of Appeal is not sitting as a court (the court has only appellate jurisdiction) when administering estates but is engaged in an administrative function. In absence of an order of the court, some banks insist that the Chief Registrar of the court should sign an agreement personally indemnifying the bank against any loss that may occur to the bank from the release of the money.<sup>47</sup> In an instance, the bank's external solicitor insisted on a certified copy of the Chief Registrar's letter ordering the bank to make the payment to the account of the Sharia Court of Appeal.<sup>48</sup> In some other instances, it could be that the banks were simply coerced into submission with barely veiled threats of dire repercussions for 'disobedience' to court 'order'.<sup>49</sup>

A similar challenge arises in respect of entitlements (gratuities, pensions, etc.) payable by the deceased's employers. In many instances, the applicable rule is that such entitlements are payable to the legal representatives and next of kin previously designated by the employee. Normally, in Muslim cases the legal representatives or next of kin collects the entitlements and hands it over to the administrators of the estate to distribute according to the applicable Islamic law. In the *Estate of Olumo*, the Kwara State Sharia Court of Appeal grappled with the challenges of collecting the terminal benefits of the deceased from his former employer the National Immunization Programme (NPI). The estate came into the Sharia Court of Appeal when one of the two wives of the deceased wrote a letter of petition against the next of kin. The letter written to the NPI was copied to the Sharia Court of Appeal and the Sharia Court of Appeal was able to take over the administration of the estate.<sup>50</sup> A similar letter was written by the wife to the Sharia Court of Appeal and copied to the NPI. Upon receipt of this petition, the Grand Kadi through the Chief Registrar of the Sharia Court of Appeal wrote to the NPI asking that the deceased's entitlements be paid into the account of the court. The NPI, presumably after taking legal advice, refused to comply with the directive. The NPI insisted that the NPI being a statutory corporation was governed by law. According to the NPI, the relevant law states that the entitlements are to be paid to the deceased's "legal representative" or to "any person designated by him during his life time as his survivor".<sup>51</sup> The court's response came through a letter signed by the Chief Registrar of the court. The letter stated that following the "application/petition" of the deceased's wife, the Sharia Court of Appeal "became seized with the matter in an official manner" and that "whatever directives [and requests] which emanate there from and there under have the potent force of a court order under the law" because of the court's "exclusive jurisdiction over [...] matters involving questions of inheritance of deceased Muslims".<sup>52</sup> The court went on to justify its assuming jurisdiction on the estate and the mandatory nature of Islamic law of inheritance on Muslims. The court stated that under Islamic law the designated next of kin cannot take precedence over the heirs in the course of administering the estate and that in any case the next of kin is no more than a trustee of the heirs. The court asked the NPI to furnish it with the names of the next of kin on file. In addition, the court attached a letter written by a brother of the deceased inviting the court to

<sup>47</sup> See *Estate of Sulaimon*, 2007 Annual Report of the Sharia Court of Appeal, Kwara State, 369 at 375-378.

<sup>48</sup> See *Estate of Adegboye*, 2007 Annual Report of the Sharia Court of Appeal, Kwara State, 265 at 279.

<sup>49</sup> For example, see *Estate of Adegboye*, 2007 Annual Report of the Sharia Court of Appeal, Kwara State, 265 at 285-286.

<sup>50</sup> 2006 Annual Report of the Sharia Court of Appeal, Kwara State, at 428.

<sup>51</sup> *Estate of Adegboye*, *supra* n. 50, at 434.

<sup>52</sup> *Estate of Adegboye*, *supra* n. 50, at 435-436.

distribute the estate.<sup>53</sup> According to the court, the letter is not only an “eloquent testimony” to the fact that the Sharia Court of Appeal is “well-positioned to handle the estate of the deceased which include all entitlements from his place of work”, it also shows that the court “enjoys the recognition and confidence of the Muslims of Kwara State for who it was established to serve and protect their interests”. The chief registrar’s letter ended with the hope that the NPI will “readily respect and comply with the laws of the land”. In response to this rather lengthy letter, the NPI complied by paying the entitlements of the deceased into the account of the court and thanking the court “for the intervention”.<sup>54</sup>

### 3. Membership of estate distributing panels

The absence of a legal framework has brought some ambivalence in the workings of the Sharia Courts of Appeal estate distribution panels. Panel membership is often fluid. Unlike court proceedings where the court would maintain the same panel of Kadis to hear a case, membership of estate distribution panels are not stable. For example, in the *Estate of Omodele*<sup>55</sup> who is a well-known and highly respected Islamic scholar, the panel met nine times. Although only three Kadis distributed the estate finally, six Kadis participated at various stages. Of these three Kadis only one was present at every stage of the proceedings; the other Kadis were absent four and three times respectively. Of the three Kadis who were not present at the final distribution of the estate, one was present at all other proceedings while two Kadis were present in only four and two of the proceedings respectively.<sup>56</sup> Again, official records of estate distribution by the Kwara State Sharia Courts of Appeal panels often list persons who are not Kadis as “officiating ministers”<sup>57</sup> and “members”.<sup>58</sup> In addition, there is often confusion about the status of Sharia Courts of Appeal officials who are not Kadis. For example, one official was listed in various proceedings of the same estate distribution panel as “secretary” and “member”.<sup>59</sup> The reports often describe the same official as “secretary” and “recording secretary” at various sittings of a panel.<sup>60</sup> In the distribution of the *Estate of Abdullateef Salaudeen*,<sup>61</sup> the report of the court says that the estate was distributed by two Islamic scholars “with guidance from” a Kadi who signed the report. One of the scholars also signed the report as “Officiating Minister/Representative of [some heirs]”.<sup>62</sup>

<sup>53</sup> It is not clear from the report whether the brother who wrote the letter is the next of kin registered by the deceased with NPI.

<sup>54</sup> 2006 Annual Report of the Sharia Court of Appeal, Kwara State, 428 at 438.

<sup>55</sup> 2011 Annual Report of the Sharia Court of Appeal, Kwara State, 480.

<sup>56</sup> 2011 Annual Report of the Sharia Court of Appeal, Kwara State, 480 at 482, 485, 488, 492, 498, 501, 503, 505 and 508.

<sup>57</sup> For terminology, see discussion above.

<sup>58</sup> For example, in the report of a panel the same official was listed as “panel member” and as “Asst. Rec. Sec [Assistant Recording Secretary]”, *Estate of Adisa*, 2011 Annual Report of the Sharia Court of Appeal, Kwara State, 401 at 401 and 403. See also another official was listed as “panel member” and “secretary” in the various sittings of a panel, *Estate of Bale*, 2011 Annual Report of the Sharia Court of Appeal, Kwara State, 416 at 416, 418 and 423.

<sup>59</sup> For example, see 2005 Annual Report of the Sharia Court of Appeal, Kwara State, 345 where an official was listed as secretary at 354 and 357 and as member at 369 and 383.

<sup>60</sup> See *Estate of Adisa*, 2011 Annual Report of the Sharia Court of Appeal, Kwara State, 401 at 401 and 403.

<sup>61</sup> 2013 Annual Report of the Sharia Court of Appeal, Kwara State, 301 at 312

<sup>62</sup> 2013 Annual Report of the Sharia Court of Appeal, Kwara State, 301 at 321.



#### 4. Limitations as to substantive issues arising out of distribution of estates

The Sharia Court of Appeal is conscious of its appellate-only jurisdiction hence its estate distribution panels are reluctant to deal with controversial matters. For example, the panels leave the issue of illegitimacy to the deceased family to resolve and abide by the family decision. It is not clear whether the modes of determining the paternity issues employed by those families are consistent with Islamic law. The reference of legitimacy issues to families and the subsequently apparent ratification of the decisions of the families by the Sharia Court of Appeal could create the false impression that those decisions have a legal backing whereas those decisions are ordinarily challengeable in the courts. This feeling of helplessness is perceivable in the two estates mentioned above where this had happened and the affected persons “left everything to God” instead of pursuing legal remedies.<sup>63</sup> The correct position is that any person dissatisfied with a family decision declaring him or her a child born out of wedlock has the right to challenge the decision in an area court. The Sharia Court of Appeal should always make it clear to all the relevant parties that such family decisions are not legal judgments of the court and could be challenged by filing suits at the area courts.

#### 5. Accountability

The absence of a well-defined legal framework could also facilitate fraud. In a case in Kaduna State, an area court judge was allegedly invited to participate in the distribution of an estate. In the course of the exercise, large sums of money were collected on behalf of the estate. The area judge ordered that the moneys totaling 23 million Naira be paid to the account of the Sharia Court of Appeal, the court that supervises area courts. The money handed over to the Chief Registrar of the Sharia Court of Appeal who paid the money into the court’s account. When it came to the distribution to the heirs, it was found that the money was not available as the registrar had allegedly absconded with the money. The Grand Kadi disclaimed responsibility on the ground that the area court judge acted extra-judicially as no case concerning the inheritance was actually before the area court. The area court judge was suspended and put on half pay for paying “wrongly” into the account of the Sharia Court of Appeal and the Court washed its hands off the case leaving the heirs to take whatever action they wished against the area court judge.<sup>64</sup> The excuses given by the learned Grand Kadi is not satisfactory to say the least. The area court judge actually ordered the money to be paid to the accounts of the Sharia Court of Appeal as is the usual practice when money is paid into area courts. It is not correct for the Grand Kadi to say in the circumstances that the area court judge was acting in a personal capacity and that the court would not accept any responsibility for the alleged misconduct of the registrar. The case illustrates the kind of issues that can arise when there are no clear-cut rules on administration of estates governed by Islamic law.

<sup>63</sup> For example, see *Estate of Alaya*, 2006 Annual Report of the Sharia Court of Appeal, Kwara State, 338 at 349, 352, 354-362, 374-375 and 377-378, where the legitimacy of several children of the deceased (from different mothers) were in issue and the family rejected some of the children.

<sup>64</sup> This story here is derived from “How a court registrar ran away with N21.6m inheritance, by Grand Khadi” by KRISHI MUSA ABDULLAHI, Daily Trust, 4 September 2014, available at: <http://www.dailytrust.com.ng/daily/news/33469-how-court-registrar-ran-away-with-n21-6m-inheritance-by-grand-khadi> (last access 21 April 2016).

## 6. Absence of probate and letters of administration

As noted above, administration of estates in the Sharia Courts of Appeal is limited to distribution of estates. The court provides no services in respect of estates not distributed by the court. This means that one cannot apply for letters of administration or letters of authority to deal with estates not administered by the court.<sup>65</sup> In addition, the Sharia Courts of Appeal have not invoked their jurisdiction in respect of the administration of wills. However, it has been suggested that the Sharia Courts of Appeal could provide facilities for the safekeeping of wills.<sup>66</sup> It is significant that the High Court already provides this service in respect of wills governed by the Wills Acts.<sup>67</sup> The suggestion goes further that a Sharia Court of Appeal can even act as executor of wills deposited with the court.<sup>68</sup>

## 7. Competition and challenges from area/Sharia courts

Another major challenge to the administration of estates in the Sharia Court of Appeal comes from area courts and Sharia courts. Area courts evolved from the colonial native courts that evolved from the pre-colonial Kadi courts. There were area courts in all of the northern states until the post-1999 era when some states replaced their own area courts with Sharia courts as part of the Islamic revivalism that took place after 1999. Area courts and Sharia courts have original jurisdiction in litigations involving Islamic personal law, which includes administration of estates under Islamic law. What operates in practice is that the Sharia Court of Appeal of each state exercises jurisdiction in the administration of non-contentious Muslim estates voluntarily submitted to the court for distribution among heirs. But when the estate is contentious, the parties have to file a case in the area courts. In the area courts and Sharia courts, there are no provisions for non-contentious distribution as distribution can be done only when a party applies to the court for that purpose and the court will proceed to hear the case and distribute the estate without needing unanimity of all the parties.

Even then, there remains the major obstacle that the Sharia Courts of Appeal have only appellate jurisdiction under the constitution and under their respective constitutive laws. The area courts and Sharia courts have original jurisdiction in all cases involving Islamic law of inheritance.<sup>69</sup> In *Adua-Hassan v Probate Registrar* the High Court rejected the contention by counsel that the Sharia Court of Appeal is best placed to issue a letter of authority (in lieu of a letter of administration) to be used by the plaintiffs to collect the deceased's cash deposits in the defendant banks.<sup>70</sup> The court held that what is appropriate is "a sealed order of the class of

<sup>65</sup> However in exceptional cases, the Court Registry will write an authorization letter for the bank to release money to the court when the application to that effect is made by a reputable person well-known to the Court such as retired Kadis and senior lawyers concerning estates not distributed directly by the Court. This was stated by Mallam Y. M. Gbalasa, Head of Department (Probate), Kwara State Sharia Court of Appeal in an interview conducted by Dr. Ismael on 21 November 2016 at the Probate Registry Office, Sharia Court of Appeal, Ilorin.

<sup>66</sup> ISHOLA, *supra* n. 33, at 48.

<sup>67</sup> See Order 52, Custody of Wills, Rule 15, Kwara State High Court (Civil Procedure) Rules, 2005: "Every original Will, of which probate or administration with Will annexed is granted shall be filed and kept in the Probate Registry in such manner as to secure at once its due preservation and convenient inspection. A copy of every such Will and of the probate or administration shall be preserved in the Registry".

<sup>68</sup> ISHOLA, *supra* n. 33, at 48.

<sup>69</sup> For example, see Section 18, Area Courts Law, Cap. A9, Laws of Kwara State, 2007 and Sections 19 and 22, Sharia Courts Law, Kaduna State Law No. 10, 2001.

<sup>70</sup> Suit no. KWS/13S/2012 decided on 30 July 2013 by the Kwara State High Court. This case is quoted and discussed extensively in ISHOLA ABDULLAHI SALIU, Judicial Declarations of 10% Probate Fee and Issuance of Letters of

Area Court vested with jurisdiction for the release of a deceased Muslim property which administration is [governed] by Islamic law”.<sup>71</sup> It would appear that the Sharia Court of Appeal and area courts/Sharia courts have respectively administrative and judicial jurisdictions in the distribution of Muslims’ estates while the Sharia Court of Appeal and area courts are trial and appellant courts respectively for litigations arising *after* distribution of such estates. Unlike the Sharia Court of Appeal, what makes the area courts unattractive here is that there is no provision for a non-contentious application to distribute inheritance. Rather, area courts will only take cases arising from distribution or non-distribution of estates, which means that the parties before area courts in this respect are plaintiffs and defendants rather than a family consisting of heirs, family members and the *wali ul amr* (‘executor’) of the estate.

## 8. Post-distribution of estates remedies

Lastly, there are some unresolved incongruities in the role of the Sharia Courts of Appeal in the distribution of estates and the position of area/sharia courts. For example, if a heir is dissatisfied with the distribution by the Sharia Courts of Appeal, such a person can seek judicial remedy. The problem here is that the only court for remedy are the area or Sharia courts which are subordinate courts to the Sharia Courts of Appeal. In fact, the only judicial jurisdiction of the Sharia Courts of Appeal are appeals coming from these courts. Two major jurisdictional incongruities arise from this. First, it is not neat that the area courts sit on a matter decided by Kadis who are superior to them. The acting Grand Kadi of Kwara State Sharia Court of Appeal remembered a case where he as an Area Court summoned a Kadi that presided the Sharia Court of Appeal panel was responsible for the distribution of the estate that was subject of litigation before the area court.<sup>72</sup> The Kadi was called as a witness and was subjected to cross-examination accordingly. Secondly, if appeals from area courts on estate distributions are made to the Sharia Courts of Appeal, Kadis who were part of distribution panels cannot sit as judges on cases emanating from the same estates that they distributed. The *Estate of Laufe* relates to the estate of Laufe who was a prominent member of the ruling family and an important chief in the Emirate. The Kwara State Sharia Court of Appeal indicated that given the status of Laufe and “out of respect for the Emir”, five Kadis would constitute the panel that would distribute the estate.<sup>73</sup> If any heir had gone to the area court and the matter came on appeal to the Sharia Court of Appeal, all the Kadis that took part in the distribution would have not be competent to hear the appeal. Given that the total number of Kadis of the court at that time was six<sup>74</sup> and the quorum of the Court for hearing appeals is three,<sup>75</sup> that would have ended in a crisis. Again, in *the Estate of Omodele*,<sup>76</sup> although the estate was eventually distributed by a panel consisting of three Kadis, all the six Kadis of the court participated in the proceedings at various times.<sup>77</sup>

Administration on Muslim Estates as Illegal in Kwara State of Nigeria: A Reportage Review, *Naklas-Buk Journal of Law*, Vol. 2 (2013), 106 at 107-118.

<sup>71</sup> Quoted in ISHOLA, *supra* n. 71, at 117-118.

<sup>72</sup> Hon Kadi M. O. Abdulkadir, interview by Ismael Saka Ismael, 14 July 2010, Ilorin, Nigeria.

<sup>73</sup> 2011 Annual Report of the Sharia Court of Appeal, Kwara State, at 360.

<sup>74</sup> The six Kadis were Haroon, Mohammad, Idris, Abdulkadi, Abdulkadir and Owolabi.

<sup>75</sup> See Section 278, 1999 Constitution.

<sup>76</sup> 2011 Annual Report of the Sharia Court of Appeal, Kwara State, at 479.

<sup>77</sup> 2011 Annual Report of the Sharia Court of Appeal, Kwara State, at 488 and 505.

## V. Conclusion: The Way Forward

Since the colonial era, there are no rules for the administration of estates in the Sharia Courts of Appeal and no such rules were made in the post-colonial period. There is a dire need to remedy the situation in the Sharia Courts of Appeal. A major step in the administration of estates of Muslims in Nigeria would be for Grand Kadis to make rules governing the administration of estates in their respective states. Such rules should be comprehensive and should include both probate and letters of administration in all estates governed by Islamic law, whether or not the estate is administrated directly by the court or by other persons. In addition, the rules concerning distribution of estates should empower the Kadis to constitute a panel for distribution of estates, but should also protect in a clear manner the power of other scholars learned in Islamic law to distribute estates according to Islamic law. For reasons of logistics and possible litigation the Sharia Court of Appeal panel for estate distribution should not consist of more than two Kadis. This would leave enough Kadis free in case the court needs to empanel the mandatory three Kadis to hear any possible appeal case on the distribution should it come to the court on appeal. Similarly, there should be rules of the Sharia Court of Appeal on the safekeeping of wills and for appointing the Sharia Court of Appeal as an executor of wills. Here again it should be clearly asserted that rules regarding the distribution of estates or to administration of wills should not exclude the rights of any qualified Muslim to distribute estates and administrate wills. As noted above, the making of these rules should be within the competence of the Grand Kadis and their respective State Governors.

Another major step that would improve the administration of estates in the Sharia Court of Appeal is to give these courts original jurisdiction in their current area of appellate competence. This will ensure that the Court will be able to deal effectively with litigations arising out of the estates administrated by Kadis rather than have area courts sit over such cases, as is currently the case.